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In the Supreme Court of the United States

OCTOBER TERM, 1988

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether it was appropriate for the court of appeals summarily to adjudicate petitioner in civil contempt of the court's prior judgment where the undisputed facts showed that petitioner had not complied with that judgment.

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OPINIONS BELOW

The adjudication in civil contempt (Pet. App. A6-A8) is unreported. The opinion of the court of appeals (Pet. App. A10-A19) enforcing the order of the National Labor Relations Board (the Board) in the underlying unfair labor practice proceeding is reported at 811 F.2d 149. The decision and order of the Board (Pet. App. A20-A22) and the decision and recommended order of the administrative law judge (Pet. App. A25-A67) are reported at 279 N.L.R.B. 747.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1988. The petition for a writ of certiorari was filed on January 30, 1989. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Carpenters Local 608, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 608), operates an exclusive hiring hall pursuant to collective bargaining agreements with various associations of employers engaged in the construction and building trades in New York City (Pet. App. A20 n.1, A28-A29). On April 30, 1986, the Board found that petitioner had violated its duty of fair representation under Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. 158(b)(1)(A)) by refusing to supply John Harte and two other Local 608 members with information they had requested in February 1983 regarding the operation of its hiring hall (Pet. App. A19).[1] The Board ordered petitioner, in pertinent part (*id.* at A21), to:

> Honor requests by Eugene Clark, Franklin McMurray, and John Harte to inspect, review, photocopy, or duplicate all hiring hall records (on payment of reasonable costs), and provide such employees information on request with regard to the operation of its hiring hall, where such requests are related to the alleged failure to properly refer such employees, including but not limited to those requests made by letter in February 1983.

On February 10, 1987, the court of appeals entered a judgment enforcing in full the Board's order. A petition for rehearing was denied on March 5, 1987 (Pet. App. A9), and petitioner then sought review by this Court, claiming that the disclosure and copying requirements of

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[1] The information request, which sought the hiring hall's referral list and related records, was prompted by the employees' concern that they were being denied referrals because of their dissident union activities (Pet. App. A51-A52).

the Board's order violated Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481(c). While its petition for certiorari (No. 86-1760) was pending, petitioner refused requests by Harte for the information requested in his February 1983 letter and, although it had not sought or received a stay of the mandate from any court, informed Harte and the Board's Regional Office that it did not intend to comply with the court of appeals' order while its certiorari petition was pending. (NLRB Mot. for Summary Adjudication in Civil Contempt [Board Motion] 2 & Attachment A.).[2] The petition for a writ of certiorari was denied on October 5, 1987. 108 S. Ct. 72.

2. On October 27, 1987, petitioner sent Harte a letter (Board Motion, Attachment B) responding to his February 1983 request for hiring hall information. The letter advised Harte that before receiving the requested information he would have to "pay the Union at the current Carpenter hourly rate plus benefits, for each hour, or part thereof, spent in" complying with his request, and "15¢ per page for any photocopied materials." The letter further advised that Harte "will be required to pay the costs prior to having the material released."

By letter dated December 8, 1987 (Board Motion, Attachment C), the Board's Contempt Litigation Branch informed petitioner that, under the judgment of the court of appeals enforcing the Board's order, petitioner could not require Harte to make any payment in advance of inspecting and reviewing the requested hiring hall records, and that he could be required to pay only the reasonable cost of photocopying documents he then specifically requested.

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[2] A copy of this motion, of petitioner's Affidavit in Opposition, and of four subsequent letters referred to in text, have been lodged with the Court.

3. On January 4, 1988, petitioner filed in the court of appeals a motion for clarification of the February 10, 1987 judgment order, asserting that the language of the order permitted it to impose the costs spelled out in its October 27, 1987 letter to Harte, and that "the cost of compliance [with the February 1983 letter request] could very easily reach into the thousands of dollars" (Board Motion, Attachment D at 5). Petitioner requested "clarification" of the February 10, 1987 judgment to the extent of allowing it, *inter alia*, to impose the costs set out in its October 27, 1987 letter "at all aspects of inspection, review, photocopying or duplicating," plus the costs of "[m]onitor[ing] all files while being inspected or reviewed," to require Harte, McMurray, and Clarke to commit in writing to the payment of such costs, and to withhold turning over the requested material until receipt of payment (*id.* at 7). In opposition to this motion, the Board asserted that the enforced order permitted petitioner only to charge for the reasonable cost of duplicating or photocopying records, should the applicants so request (Board Motion, Attachment E at 2, 5-7). On February 11, 1988, the court denied petitioner's motion for clarification, and subsequently denied a request for rehearing (Pet. App. A2; Pet. 11 n.2).

4. By letter dated February 25, 1988 (Board Motion, Attachment G), the Board's Contempt Litigation Branch again asked petitioner to make arrangments with Harte to provide him with the requested information at no cost other than the cost of reproducing specifically requested copies, stating that, if petitioner failed to provide the requested information within a week, it would recommend institution of contempt proceedings.

Petitioner's counsel, by letter dated May 3, 1988, noted that Harte came to petitioner's office on May 2, after several delays to permit petitioner to "collect[], copy[] and collate[]" the requested material (Board Motion, Attach-

ment H). The letter stated that, on arrival at petitioner's offices, Harte had been presented with a bill (for $3,333.22), representing 109 hours of time at carpenter's rates for collecting and copying requested documents, plus $322.95 (representing 15 cents per copied page), and was "advised that the material would not be turned over until the entire [$3,656.17] bill was paid" (*ibid.*). The letter further stated that Harte had offered to pay only $322.95 and that, accordingly, no materials had been turned over to him (*ibid.*).

5. On July 8, 1988, the Board filed a motion for an order adjudicating petitioner in civil contempt of the court of appeals' February 1987 judgment requiring petitioner to provide Harte with the hiring hall information requested in February 1983. The motion papers recited the facts described above, and attached the May 3, 1988 letter from petitioner's counsel stating that no materials had been or would be furnished to Harte unless and until he paid the full amount of the union's bill. The motion further stated that the recited facts were undisputed; that the parties' arguments as to the meaning of the February 10, 1987 judgment had already been placed before the court by petitioner's motion for clarification; that the charges petitioner sought to impose on Harte in May 1988 were the same charges it had sought permission to impose by its motion for clarification, a motion the court had denied three months earlier; and that summary adjudication was appropriate on the existing record (Board Motion at 4-5).

In its opposing papers petitioner admitted that it had not provided the materials specified in Harte's February 1983 request, and repeated its contention that the enforced order was ambiguous and should be read to permit it to impose all costs incurred in honoring requests for hiring hall information (Affidavit in Opp. paras. 3-5).

By order dated August 18, 1988 (Pet. App. A3-A5), the court of appeals ordered that "unless respondent provides the court with evidence showing that the [hiring hall] information [requested by Harte in February 1983] has been made available at no cost other than the reasonable costs of photocopying, the motion [for adjudication in contempt] shall be granted after 30 days from the date of this order." On August 31, 1988, petitioner filed a petition for rehearing or for rehearing en banc, and a motion for a stay of the court's August 18 order pending rehearing or the filing of a petition for certiorari. The petition and motion were denied on September 29, 1988.

6. By letter dated September 14, 1988, petitioner informed Harte that the material that had been duplicated prior to his May 2, 1988 refusal to pay the union's bill for $3,665.95 would be turned over on payment of $322.95 in cash or a certified check. Harte was told that he could "pick up the material [at the union office] on September 21, 1988 at 10:30 a.m." By letter dated September 23, 1988, the Board, in response to the court's request for information as to the status of the case, advised that Harte arrived at petitioner's office at the appointed hour and date, showed a union official that he had the $322.95 with him in cash, and asked to examine the documents before paying for them to determine whether they were the ones he had requested. The letter further reported that after telling Harte he would not be permitted to review the documents before paying for them, the union official removed the documents from the room. Harte then left without receiving any of the requested documents.

By letter dated September 26, 1988, a copy of which was sent to the court of appeals, petitioner's counsel advised the Board that petitioner had complied with the court's August 18, 1988 order by making the documents requested "available at no cost other than the reasonable costs of

photocopying," and that Harte would not "be allowed access to Union office space at no cost to himself so that he may review the thousands of documents at his leisure. It may be that after reviewing the material, he may then refuse to pay for it." By letter dated September 30, 1988, petitioner informed the court that Harte would not be allowed to review the documents in petitioner's offices before paying for them.

7. On October 31, 1988, the court found, on this record, that "[petitioner] has failed to satisfy the Court that it has complied with the judgment of February 10, 1987, and order of August 18, 1988," and accordingly adjudged petitioner "in civil contempt of the judgment of this Court issued on February 10, 1987" (Pet. App. A6). The court ordered (*id.* at A7) that petitioner, its officers, agents and representatives, purge themselves of contempt by fully obeying the court's February 10, 1987 judgment and immediately providing Harte with the hiring hall information requested in February 1983 at no cost other than the reasonable cost of photocopying; by posting notices that it had been adjudged in civil contempt and would immediately undertake purgation; and by mailing at its own expense copies of the posting, including a copy of the contempt adjudication, to all current members and all former members who were members since February 1983. The court further ordered petitioner to reimburse the Board for all costs and expenses of the contempt proceeding, and provided for discovery by the Board to verify compliance (*id.* at A8).

ARGUMENT

1. Petitioner contends (Pet. 17-24) that the contempt adjudication of the court of appeals was improperly based on an ambiguous order. This factbound contention is

without merit. As noted above (p. 3, *supra*), after the court issued its February 10, 1987 judgment enforcing the Board's order, the Board explained to petitioner that, except for photocopying costs, the Board's order did not entitle petitioner to charge Harte for any services involved in meeting his information request. When the court of appeals then denied petitioner's motion for clarification, the court effectively confirmed the Board's position that the terms of the order did not permit the charges in addition to the costs of duplication that petitioner sought permission to impose. In any event, if any doubt remained on that issue, it was removed when the panel considering the Board's contempt petition stated (Pet. App. A5) that petitioner's obligation under the court's judgment was to make the requested information available "at no cost other than the reasonable costs of photocopying," and afforded petitioner 30 days to comply with that requirement. No ambiguity, therefore, could possibly have remained at the time of petitioner's direct defiance of the court's order. Under these circumstances, the court of appeals was fully warranted in finding petitioner in contempt.

2. Petitioner incorrectly contends (Pet. 25-33) that the summary contempt adjudication was inappropriate and that petitioner was improperly denied "an opportunity to present its case before a trier of facts." Contrary to petitioner's contention (Pet. 31) that "[n]ot one Court has found summary adjudication an appropriate vehicle where the conduct complained of did not take place in full view of the Court," the courts of appeals have consistently issued summary adjudications where "admitted matters clearly sustain charges of civil contempt." See, *e.g.*, *West Texas Utilities Co.* v. *NLRB*, 206 F.2d 442, 444 & n.5 (D.C. Cir.), cert. denied, 346 U.S. 855 (1953), and cases cited therein. See also *NLRB* v. *Holyoke Water Power Co.*, 793 F.2d 18 (1st Cir. 1986); *NLRB* v. *Goodsell &*

Vocke, Inc., 645 F.2d 680 (9th Cir. 1981); *NLRB* v. *Hickman Garment Co.*, 471 F.2d 611 (6th Cir. 1972).[3]

Here, petitioner's own counsel, in his letter of May 3, 1988, described petitioner's refusal—and stated its intent to continue to refuse—to permit Harte to inspect the documents he had requested. The sole issue in dispute was whether petitioner's continuing refusal to allow Harte to inspect the records and to charge him only for those he wanted duplicated violated the conditions of the February 1987 judgment.[4] Resolution of that issue did not require

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[3] The cases cited by petitioner (Pet. 29) for the proposition that summary contempt adjudications for conduct outside the presence of the court are "highly improper" are inapposite. *In re Chaplain*, 621 F.2d 1272, 1275 (4th Cir.), cert. denied, 449 U.S. 834 (1980), and *United States* v. *Sacher*, 182 F.2d 416, 419 (2d Cir. 1950), both upheld summary criminal contempt convictions for conduct committed in the presence of the court; neither case discussed civil contempt proceedings. *Groppi* v. *Leslie*, 404 U.S. 496, 505 (1972), involved a criminal contempt citation by a state legislature.

Nor do the NLRB cases cited by petitioner (Pet. 29 n.10) stand for the proposition that summary proceedings are inappropriate for contempt adjudications. *NLRB* v. *Maine Caterers*, 654 F.2d 131, 132 (1st Cir.), cert. denied, 455 U.S. 940 (1981), is not a contempt matter. *NLRB* v. *FMG Industries*, 820 F.2d 289 (9th Cir. 1987); *NLRB* v. *Gentzler Tool & Die*, 126 L.R.R.M. (BNA) 3318 (6th Cir. 1987); *NLRB* v. *Laborers Fund Corp.*, 124 L.R.R.M. (BNA) 2078 (9th Cir. 1986); and *Florida Steel Corp.* v. *NLRB*, 648 F.2d 233 (5th Cir. 1981), are simply examples of contempt proceedings where there were disputed issues to be resolved, a special master was appointed, and, upon review by the court, a contempt adjudication was issued. None of these cases questions the propriety of summary disposition where no material factual issues are in dispute.

[4] Petitioner's complaint (Pet. 11) that "[t]he Board upon hearsay, accused the Union of acting in bad faith" misses the point. "Since this proceeding is in civil, not criminal, contempt, [petitioner's] intent is not at issue, only its actual compliance with th[e] court's orders." *Florida Steel Corp.* v. *NLRB*, 648 F.2d at 236. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

an evidentiary hearing; only the meaning of the court's prior judgment was in question.[5]

[5] There is no merit to petitioner's final contention (Pet. 30) that the requirement that it post and mail the contempt adjudication to its members is punitive rather than remedial. Posting of a contempt adjudication is the standard minimal requirement to insure future compliance, and it is irrelevant that petitioner had posted a previous notice, with which it then failed to comply. Contrary to petitioner's contention (Pet. 31), the court in *Florida Steel Corp.* v. *NLRB*, 648 F.2d at 240-241, ordered that notice of the contempt adjudication be posted; it concluded only that, in the circumstances of that case, additional notice in the form of mailing and reading aloud the court's order to employees was not necessary. The determination of the court below that posting *and* mailing were necessary here merely involved an assessment that, in the circumstances of this particular case, both measures were needed to insure future compliance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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